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## Masterpiece Cakeshop: “Does Anybody Really Know What Time It Is?”, 52 UIC J. Marshall L. Rev. 83 (2018)

Ted Hong

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# MASTERPIECE CAKESHOP: “DOES ANYBODY REALLY KNOW WHAT TIME IT IS?”

TED H. S. HONG\*

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## I. INTRODUCTION

Lost in the controversy surrounding the United States Supreme Court’s decision in *Masterpiece Cakeshop, Ltd., v. Colo. Civil Rights Comm’n*<sup>1</sup> is the Court’s clarion call about the nature of administrative agency hearings. The opinion notifies counsel who represent clients before administrative agencies and counsel assigned to advise administrative agencies that greater attention must be paid to protect the procedural and substantive rights of parties who come before administrative agencies.<sup>2</sup>

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1. *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm’n*, 138 S. Ct. 1719 (2018).

2. *Id.*

## II. BACKGROUND

The *Masterpiece Cakeshop*<sup>3</sup> decision centers around a Denver suburb bakery that was owned and operated by an expert baker for twenty-four years.<sup>4</sup> The owner-baker was a devout Christian.<sup>5</sup> In 2012, a same sex couple asked the owner-baker about ordering a cake for their wedding.<sup>6</sup> He told the couple that he did not make cakes for same-sex weddings, but he would make other cakes and sell them other items.<sup>7</sup> The couple filed a complaint of discrimination based on their sexual orientation with the Colorado Civil Rights Division.<sup>8</sup>

The subsequent administrative agency process found in favor of the couple. The Colorado Civil Rights Division found probable cause to support the allegation of discrimination based on sexual orientation.<sup>9</sup> An administrative law judge ruled that the owner-baker's refusal was unlawfully discriminatory.<sup>10</sup> The Colorado Civil Rights Commission affirmed and adopted the administrative law judge's decision.<sup>11</sup> The owner-baker appealed to the Colorado Court of Appeals, which affirmed the Commission's decision and order.<sup>12</sup> The Colorado Supreme Court decided not to hear the owner-baker's appeal and the United States Supreme Court granted certiorari, based on the owner-baker's claim that the Colorado Civil Rights Commission unconstitutionally violated the Free Speech and Free Exercise Clauses of the First Amendment.<sup>13</sup> The United States Supreme Court reversed the opinion of the Colorado Court of Appeals.<sup>14</sup>

## III. EXECUTIVE SUMMARY

The purpose of this article is to highlight the less controversial part of the Court's opinion. This article is intended for counsel representing parties before federal, state, municipal and local administrative agencies, counsel representing administrative agencies and people serving on administrative agencies.

The article discusses how the *Masterpiece Cakeshop*<sup>15</sup> opinion was the culmination of discussing the role of procedural due process

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3. *Id.*

4. *Id.* at 1724.

5. *Id.*

6. *Id.*

7. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1724.

8. *Id.* at 1725.

9. *Id.* 1726.

10. *Id.*

11. *Id.*

12. *Id.* at 1726-27.

13. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1727.

14. *Id.* at 1732.

15. *Id.* at 1719.

in the administrative agency process. The Court’s opinion has “real time” application in a current case before the Intermediate Court of Appeals, State of Hawai‘i. This article also highlights the difference in appointment of boards and commissioners in three states: Colorado, Hawai‘i and Illinois. The article concludes with practical suggestions for all participants involved in administrative agency hearings.

The pop song and culture references in this article are a reflection of the author’s generation and the author apologizes for not downloading the “update.”

#### IV. WHAT’S THE BUZZ: “TELL ME WHAT’S HAPPENING”<sup>16</sup>

##### *A. Administrative Agencies Acting as Adjudicators Must Be Fair and Impartial*

In the less controversial portion of the *Masterpiece Cakeshop* decision, the Court noted the general principle that when acting in an adjudicatory fashion, administrative agencies must be neutral, respectful and avoid statements of hostility towards participants.<sup>17</sup> The Court pointed to three statements made by commissioners during public hearings while adjudicating the cake shop owner’s case.<sup>18</sup> The first two statements made by a commissioner, to the effect that personal religious beliefs should not drive decisions involving customers, the Court felt that could be interpreted as a restatement of the anti-discrimination law in Colorado.<sup>19</sup> However, a third statement made by another commissioner during a second public hearing became the tipping point for the Court. Quoted in its entirety, the commissioner stated:

I would also like to reiterate what we said in the hearing or the last meeting. Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be—I mean, we—we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to—to use their religion to hurt

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16. Andrew Lloyd Weber and Tim Rice, *What’s the buzz, on JESUS CHRIST SUPERSTAR: A ROCK OPERA* (Decca 1970).

17. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1729-30.

18. *Id.* at 1729.

19. *Id.*; see also COLO. REV. STAT. § 24–34–601(2)(a) (2018) (stating

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation . . .).

others. Tr. 11–12.<sup>20</sup>

The Court noted that after this offensive statement was made, no one objected to it, nor did the state court reviewing the appeal mention it.<sup>21</sup> The Court's concern was that the statement was made "by an adjudicatory body deciding a particular case."<sup>22</sup> The Court concluded that "Phillips was entitled to a neutral decisionmaker who would give full and fair consideration to his religious objection as he sought to assert it in all of the circumstances in which this case was presented, considered, and decided."<sup>23</sup> The decision to overturn the state court was grounded in the Free Exercise Clause of the First Amendment.<sup>24</sup>

### B. "Due Process" By Any Other Name

Thinking that the *Masterpiece Cakeshop* decision is limited to the First Amendment misses the point. Part of the opinion assumes that parties appearing before administrative agencies are entitled to neutral and respectful consideration of their concerns and is built on the solid foundation of earlier opinions. As early as 1927, the Supreme Court in *Tumey v. State of Ohio*,<sup>25</sup> held that a conflict of interest by an administrative authority could rise to the level of a due process violation.<sup>26</sup> The appellant in *Tumey* was convicted of unlawfully possessing intoxicating liquor by the mayor of North College Hill, Ohio.<sup>27</sup> By state law, the village received half of the fines levied against those convicted.<sup>28</sup> The village council also adopted an ordinance that allowed the mayor to supplement his income by keeping any fees he levied against anyone he convicted.<sup>29</sup> The Supreme Court overturned the conviction, based on the conflict of interest and noted:

Every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the State and the accused, denies the latter due process of law.<sup>30</sup>

Fast forward to the era when "Members Only" jackets<sup>31</sup>

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20. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1729.

21. *Id.* at 1729-30.

22. *Id.* at 1730.

23. *Id.* at 1732.

24. *Id.*

25. *Tumey v. State of Ohio*, 273 U.S. 510 (1927).

26. *Id.* at 531-32.

27. *Id.* at 515.

28. *Id.* at 517.

29. *Id.* at 519-20.

30. *Id.* at 532.

31. Charles Cronin, *Genius in a Bottle: Perfume, Copyright, and Human Perception*, 56 J. COPYRIGHT SOC'Y U.S.A. 427, 484 (2009) (stating "Members

dominated the nightclub scene, in *Marshall v. Jerrico, Inc.*<sup>32</sup> In *Marshall*, the Court addressed the issue of whether an administrative agency violated due process when it kept the fines and penalties imposed on violators.<sup>33</sup> An assistant regional administrator assessed a fine and additional penalty against a Delaware corporation for willful violations of anti-child labor provisions in the Fair Labor Standards Act.<sup>34</sup> By law, the fines and assessed penalties were redirected back to the Department of Labor, Employment Standards Administration, specifically to reimburse the agency for enforcement efforts.<sup>35</sup> The corporation sought a *de novo* hearing before an administrative law judge, who upheld the fine but found there was no willful violation and vacated the penalty.<sup>36</sup> The corporation filed a federal court challenge to the reimbursement law alleging it violated the Due Process Clause under the Fifth Amendment.<sup>37</sup> The district court agreed with the corporation but the Supreme Court reversed.<sup>38</sup> The Court held there was a fundamental difference between an administrative agency acting in an adjudicatory capacity and when it acts in a prosecutorial capacity.<sup>39</sup> The language in the *Marshall* opinion foreshadowed the language in the *Masterpiece Cakeshop*:

The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. *This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision-making process . . .* The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law . . . At the same time, it preserves both the appearance and reality of fairness, “generating the feeling, so important to a popular government, that justice has been done,” . . . by ensuring that *no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him*<sup>40</sup> (emphasis added).

In 1993, while Whitney Houston’s, “I Will Always Love You” topped the charts, the Supreme Court issued its opinion in *Concrete*

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Only” jackets, successfully marketed to style-conscious men in the early 1980’s . . .”).

32. 446 U.S. 238 (1980).

33. *Id.* at 242.

34. *Id.* at 240.

35. *Id.* at 239-40; *see also* 29 U.S.C. § 216(e) (2018) (referring to “Civil penalties for child labor violations”).

36. *Id.* at 240-41.

37. *Id.* at 241.

38. *Id.* at 241-42.

39. *Id.* at 243, 247-48.

40. *Id.* at 242.

*Pipe & Prod. of Cal., Inc., v. Constr. Laborers Pension Tr. for S. Cal.*<sup>41</sup> Although this was an ERISA case, the Court addressed what happened when an administrative agency acted in an adjudicatory capacity.<sup>42</sup> The employer, Concrete Pipe, withdrew from a pension trust (Plan) and was assessed a “withdrawal liability” as determined by the pension trust’s actuary and trustees.<sup>43</sup> The employer objected and by law, the parties arbitrated their differences.<sup>44</sup> One of the grounds for the employer’s appeal was that the assessment by Plan trustees denied it an “impartial adjudicator.”<sup>45</sup> More importantly, the Court reiterated that due process requires a neutral adjudicator:

Where an initial determination is made by a party acting in an enforcement capacity, *due process may be satisfied by providing for a neutral adjudicator to “conduct a de novo review of all factual and legal issues”*<sup>46</sup> (emphasis added).

The choice of language by the Court in *Masterpiece Cakeshop*, cannot be attributed to coincidence or limited to First Amendment cases. The Court was signaling to federal, state and local administrative agencies that when acting in an adjudicatory capacity, the agency, including its commissioners or board members, need to act in a neutral, objective and respectful manner.<sup>47</sup> The *Masterpiece Cakeshop* opinion has broader application.

### C. “Blue Hawai`i”<sup>48</sup>

The *Masterpiece Cakeshop* principle regarding neutrality of administrative hearings has already surfaced in other contexts. The issue of disrespectful and hostile comments made by people appointed to serve on commissions and boards has already washed up on the beaches of Hawai`i. The Intermediate Court of Appeals, State of Hawai`i, is currently reviewing the case of *Thatcher v. Haw. State Pub. Charter Sch. Comm’n*.<sup>49</sup>

In 2015, appellant John Thatcher, a public charter school principal, challenged the State of Hawai`i Public Charter School Commission’s decision to adopt a new admissions policy that would

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41. *Concrete Pipe & Products of Cal., Inc., v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602 (1993).

42. *Id.* at 618-619.

43. *Id.* at 610.

44. *Id.* at 614.

45. *Id.* at 615.

46. *Id.* at 618.

47. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1732; *Marshall*, 446 U.S. at 243 (holding “justice must satisfy the appearance of justice . . .”).

48. BLUE HAWAII (Hal Wallis 1961).

49. Opening Brief, *Thatcher v. Haw. State Pub. Charter Sch. Comm’n*, CAAP No. 17-0000092, 2017 WL 9673967 (Hawai`i Ct. App. June 26, 2017).

apply to all public charter schools, including Mr. Thatcher's school.<sup>50</sup> Mr. Thatcher objected that the commission's proposed policy change, by law, had to be adopted in open, public hearings.<sup>51</sup> After the commission rejected Mr. Thatcher's objections, he filed a lawsuit challenging the commission's actions.<sup>52</sup> During discovery, email discussions revealed that not only had the commission members discussed and resolved public matters outside commission meetings, but the commissioners and salaried staff traded offensive and disparaging remarks about Mr. Thatcher using their government assigned email accounts, including:

Hi, Catherine and Peter. *Forwarding you our latest fan mail from John Thatcher.* We've also forwarded it to Kunio, whose initial reaction is that he doesn't find it very persuasive but will get back to us<sup>53</sup> (emphasis added).

The Chief Operations Officer, a public employee with the Commission, shared her opinion about Mr. Thatcher with other commissioners and staff:

Looks good to me! *Wow so much work for one problem child* (Thatcher) . . .<sup>54</sup> (emphasis added).

Shortly after, the Commission's chair emailed the commissioners and commission staff back and threatened:

Talked to Mitch about some of our fun. *He may be enough to take care of Thatcher all by himself*<sup>55</sup> (emphasis added).

Those statements were never contested by the Commission, the individual commissioners, staff or the state deputy attorney general assigned to the Commission and the appeal.<sup>56</sup> Mr. Thatcher raised the issues of whether the Commission was required to conduct its official business during public meetings and whether the disparaging and threatening comments about him violated his due process rights to a fair and impartial hearing.<sup>57</sup> As of the date of this article, the Intermediate Court of Appeals assigned a panel of appellate court judges to review the case.

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50. *Id.* at \*2.

51. *Id.*

52. *Id.* at \*5.

53. *Id.* at \*3; (Record on Appeal "ROA" filed on April 21, 2017 (ROA at 448); The individual referred to as "Kunio" in the emails is Kunio Kuwabe, Hawaii Deputy Attorney General, Education Division).

54. *Id.* at \*4; ROA at 442.

55. *Id.* at \*4; ROA at 442.

56. *Id.*; ROA at 442-43.

57. *Id.* at 23-24; *Mauna Kea Anaina Hou v. Bd. of Land & Nat. Res.*, 363 P.3d 224, 228-29 (2015); *see also* *Office of Disciplinary Counsel v. Au*, 113 P.3d 203, 214 (2005) (stating "[T]he test for appearance of impropriety is whether the conduct would create in reasonable minds a perception that the judge's ability to carry out judicial responsibilities with integrity, impartiality and competence is impaired[.]").



### D. *Coulda, Woulda, Shoulda*

The appointment of people to commissions and boards is generally within the authority of the governmental entity's chief executive. In the states of Colorado, Hawai'i and Illinois, commissioners for the Civil or Human Rights Commission, charged with enforcing anti-discrimination laws, are appointed by the respective Governor.<sup>58</sup> In Colorado, seven members from the private sector, public sector and community are appointed to the commission and serve on a voluntary basis.<sup>59</sup> The Governor in Hawai'i appoints five commissioners to the Hawai'i Civil Rights Commission, who serve as volunteers.<sup>60</sup> Qualifications for prospective commissioners include knowledge of and experience in civil rights matters and a "demonstrated commitment" to the preservation of civil rights.<sup>61</sup>

Illinois may serve as a model for other administrative agencies, commissions and boards. The Governor appoints seven members to the state's Human Rights Commission.<sup>62</sup> The commissioners are compensated.<sup>63</sup> Commissioners are required to meet certain qualifications including being a lawyer, previously serving as a Hearings Officer for the Commission or having experience in the area of employment discrimination.<sup>64</sup> They also receive formal training in employment discrimination, professional and ethical standards.<sup>65</sup>

The difference is not whether commissioners are compensated, but what training they receive. Illinois is the only state that formally trains its commissioners.<sup>66</sup> After the decision in *Masterpiece Cakeshop*, the argument could be made that government agencies need to provide commissioners and board members formal training on being neutral decisionmakers during adjudicatory proceedings including providing parties a fair, respectful and objective process.<sup>67</sup> The consequences of not providing training are sobering.

The *Masterpiece Cakeshop* case started in September of 2012.<sup>68</sup> The Supreme Court's opinion was filed nearly six years later on

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58. COLO. REV. STAT. § 24-34-303(b)(I) (2018); HAW. REV. STAT. § 368-2(a); 775 ILL. COMP. STAT. 5/8-101(A) (2018).

59. COLO. REV. STAT. § 24-34-303 (2018).

60. HAW. REV. STAT. § 368-2(a) (2018).

61. *Id.*

62. 775 ILL. COMP. STAT. 5/8-101(A) (2018).

63. 775 ILL. COMP. STAT. 5/8-101(D) (2018).

64. 775 ILL. COMP. STAT. 5/8-101(G) (2018).

65. 775 ILL. COMP. STAT. 5/8-101(F) (2018).

66. *Id.*

67. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1729-30; *Mauna Kea Anaina Hou*, 363 P.3d at 228-29.

68. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1725.

June 4, 2018.<sup>69</sup> The attorney's fees and costs for the cake shop owner have not been publicly disclosed. The attorney's fees and costs for the taxpayers of the State of Colorado have not been disclosed. The cake shop owner's personal and professional suffering must be immeasurable. The impact this case has had on the couple who originally ordered the cake for their wedding must be substantial. The humiliation suffered by the Colorado commissioner who made the offensive remark, quoted at length and the basis for overturning the Colorado Courts by the Supreme Court must be significant.<sup>70</sup> All sides in this case suffered because a single Colorado commissioner did not or would not understand the commission was acting in an adjudicatory capacity, instead of a prosecutorial or adversarial role.

## V. “(YOU GOTTA) FIGHT FOR YOUR RIGHT (TO PARTY)”<sup>71</sup>

Having litigated cases in federal, state courts and appearing before numerous county, city, state and federal administrative agencies, representing clients, mandatory training for all commissioners and board members is wishful thinking. However, in light of the *Masterpiece Cakeshop* decision, there are some concrete actions that can be taken at every stage in the administrative agency process:

### A. *Representing a Party Before a Commission or Board*

When a commissioner, board member or agency, displays their bias or prejudice, you need to make your Record for the appeal. Be aware of the Record and object to any offensive or hostile statements. Point out, in a respectful manner, how your client is being unfairly prejudiced by any misconduct. Speak clearly and calmly, so the recording and transcript of the proceedings can be made. Maintain your professionalism and focus on your client's needs.

### B. *Appointing Authorities*

A Mayor, Governor, or panel that recommends individuals for commissions and boards, should pay greater attention to the personal and professional qualifications of the people being nominated to serve. There needs to be a thorough vetting process. The time spent in vetting potential nominees will avoid costly and embarrassing mistakes by appointees later. A good vetting process promotes public confidence in government. Also, the appointing

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69. *Id.* at 1719.

70. *Id.* at 1729.

71. BEASTIE BOYS, *Fight for Your Right to Party*, on LICENSED TO ILL. (def jam Records 1986).

authority should not hesitate to ask for resignations from commissioners and board members who engage in any misconduct.

### *C. Advising Commissions and Boards*

Government attorneys assigned to commissions and boards need to make sure that all members receive training on how to conduct proceedings in a neutral, respectful and objective manner. They should report misconduct by commissioners and board members to higher authorities instead of rubber-stamping or ignoring them.<sup>72</sup> They need to act as a “counselor” and advise their clients if the proceeding appears to be heading in the direction of a potential due process violation. To paraphrase an old adage, an ounce of prevention . . . avoids an award of attorney’s fees and costs.

### *D. Chairperson*

As Chairperson of a commission or board, it is important to be mindful of the proceeding and in what direction it is headed. You cannot tell other members what to think or say, but you can anticipate and stop intemperate and disrespectful conduct by commission members, board members or staff. If you are the cause of the improper misconduct, then it may be time to resign and move on.

### *E. Commission or Board Members*

If you see something, say something. If you feel a colleague on the commission or board is acting inappropriately, you need to say something. In the *Masterpiece Cakeshop* decision, the Court specifically pointed out that no other Commissioner objected, or tried to correct the record and allowed the offensive statement to go unchallenged.<sup>73</sup> To avoid having a mistake explode into what later becomes a United States Supreme Court opinion, you need to say something to the Chairperson, to other commissioners, even to the person who was wrong. You can do it privately or publicly depending on circumstances. Not saying anything and allowing the process to devolve into a violation of a party’s right to due process, will only waste taxpayers time and money.<sup>74</sup>

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72. Opening Brief, *Thatcher v. Haw. State Pub. Charter Sch. Comm’n*, CAAP No. 17-0000092, 2017 WL 9673967 (Hawai’i Ct. App. June 26, 2017).

73. *Masterpiece Cakeshop, Ltd.*, 138 S. Ct. at 1729-30.

74. WAR, *Slippin into Darkness*, on ALL DAY MUSIC (1971).

## VI. CONCLUSION – “ONE TOKE OVER THE LINE”<sup>75</sup>

With greater frequency, administrative agencies, commissions and boards are performing adjudicatory functions and determining past and present rights and liabilities of individuals and facts that are controverted.<sup>76</sup> Everyone involved in the process needs to pay more attention to how the process is being conducted. In *Masterpiece Cakeshop* the United States Supreme Court put everyone who participates in the administrative agency process on notice about what is required when an administrative agency acts in an adjudicatory capacity. If you represent clients before an administrative agency or advise them, you run the risk of wasting hundreds of thousands of dollars in attorney’s fees, costs and time that your client and taxpayers will have to pay by ignoring the Court’s warning.

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75. BREWER & SHIPLEY, *One Toke Over the Line*, on TARKIO (1970).

76. *Green Party of Haw. v. Nago*, 378 P.3d 944, 953-54 (2016).

